

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANTS: Rustic Farm Irrevocable Family Trust; Derek  
Wheatley; Heather Wheatley

**CASE 76D-0030-R-2022**  
76D 141629-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

Water Right Claim 76D 141629-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. This claim received an issue remark. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order. Claims examination confirms

the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. This claim did not receive any objections or notices of intent to appear.

The Court consolidated this claim into Water Court Case 76D-0030-R-2022 on August 4, 2022. The Court set a filing deadline by which Claimants were to file information resolving the issue remark on the claim. No Claimant filed a response.

### **FINDINGS OF FACT**

1. Claim 76D 141629-00 appeared with the following issue remark:  
THE TYPE OF RIGHT IS MISSING
2. The Court's consolidation order requested Claimants file information regarding the type of right. The Court did not receive a response.
3. A water right questionnaire is included in the claim file. This questionnaire, dated April 5, 1983, is filled out by the original claimant, Robert R. Utter. Mr. Utter states stock water use occurred from "the early days of private ownership up until the present."
4. The type of right should be "use."

### **APPLICABLE LAW**

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.
2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.
3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.
4. The type of historical right is the historical basis of an existing right. This can be a decreed right, filed right, reserved right, or use right. Rule 2(a)(70), W.R.C.E.R.

5. A “use right” is an existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree. Rule 2(a)(71), W.R.C.E.R.

### **CONCLUSIONS OF LAW**

1. The evidence in the claim file for the above-captioned claim indicates it is more likely than not that the claimed right is a “use right” because stock watering occurred around the time the place of use was first privately owned. This use was likely begun without a filed notice of appropriation or decree.

2. The classification of the above-captioned claimed water right as a “use right” provides the Court with a sufficient basis to resolve and remove the issue remark on the claim.

### **RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A post-decree abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state’s centralized record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service via USPS Mail:**

Rustic Farm Irrevocable Family Trust  
% Derek Holmes TTEE  
11 Heaver Gate  
Dewinton, AB T0L 0X0  
Canada

Derek Wheatley  
Heather Wheatley  
154 Tuscany Ravine Close NW  
Calgary, AB T3L 2Y6  
Canada

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
KOOTENAI RIVER  
BASIN 76D**

**Water Right Number:** 76D 141629-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:**

DEREK WHEATLEY  
154 TUSCANY RAVINE CLOSE NW  
CALGARY, AB T3L 2Y6  
CANADA

HEATHER WHEATLEY  
154 TUSCANY RAVINE CLOSE NW  
CALGARY, AB T3L 2Y6  
CANADA

RUSTIC FARM IRREVOCABLE FAMILY TRUST  
% DARRYL HOLMES TTEE  
11 HEAVER GATE  
DEWINTON, AB T0L 0X0  
CANADA

**Priority Date:** DECEMBER 31, 1910

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** PHILLIPS CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNE	15	37N	27W	LINCOLN
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
2		S2S2NW	15	37N	27W	LINCOLN
<b>Period of Diversion:</b>	JANUARY 1 TO DECEMBER 31					
<b>Diversion Means:</b>	LIVESTOCK DIRECT FROM SOURCE					
<b>Period of Use:</b>	JANUARY 1 TO DECEMBER 31					

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNE	15	37N	27W	LINCOLN
2			S2S2NW	15	37N	27W	LINCOLN